

MEMORANDUM OF LAW

DATE: August 26, 1992

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Effect of Proposition B Adopted June 2, 1992, on
Holding Special Elections to Fill Council Vacancies

This is in response to your memorandum dated June 10, 1992, in which you ask about the procedure and timing of conducting a special election to fill potential Council vacancies in light of the passage of Proposition B on the June 2, 1992, municipal ballot. Specifically, assuming the City has received letters of resignation for future vacancies, you ask whether the City can call or hold a special election prior to a vacancy actually occurring, or must the City wait until the vacancy actually occurs to call or hold the election. Assuming the special election itself cannot be called or held in advance of the actual vacancy, you ask whether some preparation for the special election, e.g., opening of nominations and processing of candidates, may begin before the actual vacancy occurs. The questions arise because two Councilmembers are currently running for other non-City offices in races to be decided in the November 3, 1992 election, and you anticipate that one or both Councilmembers may resign from the City office before their Council terms expire.

As a related matter, you also ask whether former City Attorney Edward T. Butler's memorandum dated November 6, 1968, on a closely related topic, a copy of which is attached hereto as Exhibit A, remains valid.

BRIEF ANSWER

An election may be called to fill a future vacancy, if that vacancy is certain. Under City Charter section 12, as amended on June 2, 1992, the election must be held within ninety (90) days of a vacancy. We interpret this section to mean that the City Clerk may publish notice of the impending vacancy, open nominations and process candidates before the vacancy occurs. We also interpret this section to mean that the City Council may

adopt an ordinance calling for the special election before or after the vacancy actually occurs. In addition, we interpret this section to mean that the City Council may adopt an ordinance requiring the special election to be held either before or after the vacancy actually occurs. Former City Attorney Edward T. Butler's memorandum dated November 6, 1968, construes Charter section 12 before the June 1992 amendments came into effect. Therefore, the advice in that memorandum is limited to the facts set forth therein and does not bear on Charter section 12 as recently amended.

DISCUSSION

The following discussion assumes that the impending vacancy is certain to occur even though the effective date is sometime in the future.^F

Mikel Haas, Deputy Director, Elections/Legislative Services, City Clerk's Office, confirmed by telephone that the question presented is limited to future vacancies certain to occur.

We acknowledge, but do not here opine, that different rules will apply to "conditional" resignations, i.e., those resignations which state that they will become effective only if certain conditions are met.

Resolution of the issues presented is controlled by San Diego City Charter section 12, as amended on June 2, 1992, and by the San Diego Election Code which is set forth in the San Diego Municipal Code.

I. San Diego City Charter

Proposition B adopted on June 2, 1992, amended City Charter section 12 to require holding special elections to fill vacancies occurring in the office of a Council District.^F Additionally, Charter section 12, as amended by Proposition B, states that the candidate receiving the greatest number of votes (instead of the majority of votes) will fill the vacancy. But this issue is not relevant to the present inquiry and will not be discussed here.

except for

vacancies occurring within 100 days of an upcoming regular municipal election. Charter section 12 as amended reads in relevant part as follows:

Except as otherwise provided in this paragraph, in the event a vacancy occurs for any reason in the office of a Council District, the Council shall immediately cause an election to be held to fill such vacancy solely in the district in

which the vacancy occurred. Such election shall be conducted within ninety (90) days of the vacancy. If however, a vacancy occurs for any reason in the office of a Council District within 100 days of an upcoming regular municipal election, the Council may in its discretion forgo the election process and fill the vacancy by appointment.

¶Emphasis added.σ

Significantly, we think, Charter section 12 as amended in June 1992 does not specify that a general election to fill a vacancy must be conducted within ninety (90) days after the vacancy occurs. The language leaves the question open as to whether the election could also be conducted within ninety (90) days before the vacancy. Either scenario appears to be permitted by the Charter amendment.

Although the Charter does not purport to answer this question when the vacancy arises for some reason other than normal expiration of a Councilmember's term, i.e., when a vacancy results from death, resignation or disqualification, it does provide guidance in other areas. Significantly, the Charter specifies that both primary and general elections are to be held to fill a Council office before the vacancy occurs when the office is vacant due to expiration of a term. Charter section 10.

Moreover, the Charter provides that the City Council has the authority, and indeed has the duty, to adopt ordinances interpreting and administering Charter section 12 as well as other Charter sections governing City elections. (Charter section 8.)¶

Charter ' 8 reads: Within ninety (90) days after this amendment has been ratified by the State Legislature the Council shall adopt an election code ordinance, providing an adequate and complete procedure to govern municipal elections, including the nomination of candidates for all elective offices. All elections provided for by this Charter, whether for choice of officers or submission of questions to the voters, shall be conducted in the manner prescribed by said election code ordinance. ¶Emphasis added.σ

The City Council has exercised this authority as evidenced by ordinances it has adopted to facilitate City elections. These ordinances are codified in chapter II, article 7, sections 27.2001 through 27.3211 of the San Diego Municipal

Code (hereafter "City's Election Code"). The remainder of this memorandum is devoted to an examination of the City's Election Code as it pertains to the issues presented.

II. City's Election Code

Various provisions of the City's Election Code pertain to calling and holding special elections to fill vacant City offices. These are discussed separately below.

A. Division 24 - Vacancies

Division 24 of article 7, chapter II of the San Diego Municipal Code ("SDMC"), deals with some but not all critical aspects of calling and holding special elections to fill Council vacancies that are due to death, resignation or disqualification. Division 24 basically iterates the Charter section 12 requirement that special elections may be called to fill vacant elective offices caused by death, resignation or disqualification. (See SDMC sections 27.2402 and 27.2403).

Sections 27.2402 and 27.2403F

Unless otherwise specified in this memorandum, the term section refers to a San Diego Municipal Code section. prescribe what must be done in the event of an actual vacancy caused by death, resignation or disqualification, but are silent on whether an election may be called or held prior to an actual vacancy occurring. Section 27.2402 essentially requires that a special election called to fill a vacant office be conducted "as far as practicable" under article 7, chapter II, of the San Diego Municipal Code. Section 27.2403 deals generally with setting dates of elections to fill vacancies, and requires that a successful candidate elected at a special election assume office within 150 days of the date the election is called. This section has not been amended since adoption of Proposition B in June 1992 and does not specify whether a special election may be called or held before a vacancy actually occurs.

B. Division 31 - Procedure for Filling Vacancies in Elective Offices

Division 31 of Chapter II, Article 7, deals specifically with procedures to fill Council vacancies. Sections 27.3101 through 27.3108. A copy of that Division is attached as Exhibit B to this memorandum. We note that Sections 27.3101 through 27.3108 also have not been amended yet to bring them into full accord with Proposition B. For example, Section 27.3101 still requires the City Council to fill vacancies by appointment and resort to elections only in the event they fail to appoint.

Even though Sections 27.3101 through 27.3108 have not yet been amended to conform to the amendments to Charter section 12,

some of these sections as currently written still provide some guidance in answering the questions presented. Therefore, we will examine them here.

Section 27.3102 is among those sections that are still viable in part and applicable to the issues presented. Section 27.3102 deals in part with vacancies in Council offices that occur as a result of resignations. Among other things, it requires that notification containing the effective date of resignation be received in the office of the City Clerk for a vacancy to occur by resignation. Furthermore, it states that "a resignation is effective upon receipt, unless specified otherwise in the written resignation." SDMC section 27.3102, however, is similarly silent on whether a special election to fill a vacancy caused by resignation may be called or held before the effective date of the resignation.

Section 27.3103, which governs notices of vacancies in Council offices that are required to be published by the Clerk, also applies in part to the question presented. This section specifically states that some preliminary steps pertaining to publication of notices of impending vacancies may be taken before the vacancy actually occurs. Although the language appears intended primarily to govern publication of notice if the appointment process is to be used to fill the vacancy, the section is clearly comprehensive enough to cover notices of impending vacancies to be published when a special election is to be called to fill the vacancy.

In particular, Section 27.3103(b) states that "If a vacancy will exist by reason of a resignation to take effect at some future time . . . the City Clerk shall publish within a reasonable time . . ." a notice stating in which office the vacancy will exist, when the vacancy will occur, where information may be obtained and when applications must be returned. Applications may be returned the day before the vacancy, provided the notice was published fourteen days prior to the vacancy. With one exception,

The one exception is Section 27.3108. This section deals with ballot designations of persons who have been appointed to fill vacancies.

which is not relevant to the

analysis here, the rest of Division 31 is devoted to defining the details of the appointment process, and therefore those sections will not be discussed.

C. Miscellaneous Election Code Provisions

Other more general provisions of the City's Election Code provide some guidance on the issues presented. Section 27.2020

requires that the term of an officer elected at a special election is to commence at the time the Council adopts the resolution declaring the results of the election. Although not directly answering the issues presented, this section discourages, if not outright precludes, holding a special election early in the process and would clearly preclude the Clerk from presenting a proposed resolution declaring the election results to the Council before the vacancy actually becomes effective.F

As a practical matter, however, the Clerk generally needs almost the full ninety (90) days required by Charter section 12 to conduct a special election from start to finish (opening nominations to holding the election). Therefore, even if a special election were called and held prior to the vacancy actually occurring, it is highly unlikely that the results of the election would be available before the vacancy occurred. Nonetheless, it is probably advisable that Section 27.2020 be amended to more clearly reflect Proposition B's amendments to Charter section 12.

Sections 27.2110 and 27.2111, which deal with obtaining and filing nomination papers, respectively, also deal with the timing of elections. Both sections' requirements for special elections would be compatible, however, with calling or holding a special election either before or after a vacancy actually occurs. But they provide no real guidance to resolve the issues presented.

CONCLUSION

In summary the City's current Election Code does not expressly answer whether the City may call or hold a special election to fill a vacancy caused by resignation of a Councilmember prior to a vacancy occurring. Charter section 12 merely states that a special election would be conducted within ninety (90) days of a vacancy. The City Council clearly has the authority and, by reason of the above-described ambiguities, the duty to adopt ordinances interpreting Charter sections pertaining to elections, including recently amended Charter section 12. The Council therefore has authority to make the determination as to when a special election may be called and held to fill a vacancy caused by resignation.

Former City Attorney Edward T. Butler's Memorandum of Law dated November 6, 1968, construes Charter section 12 prior to the amendments created by Proposition B in June 1992. Hence the advice in that memorandum is limited to the facts therein and does not bear on the amended language of Charter section 12.

In light of the present ambiguities in the City's Election Code and the amended language of Charter section 12, we urge you to submit proposed amendments to the Municipal Code as soon as

possible for consideration by the Council. The following issues should be raised and resolved by your proposed amendments: 1) state what constitutes an effective resignation and to whom the resignation may or shall be submitted; 2) state whether and under what circumstances resignations may be withdrawn; 3) state what constitutes acceptance of a resignation; 4) state whether the City's reliance on a tendered resignation, e.g., by taking steps of declaring a vacancy or opening nominations, will prevent withdrawal of a resignation; 5) state whether a conditional resignation will be considered effective; and, 6) state whether a special election may precede or follow a vacancy.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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Attachments

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